Filed 6/15/12 P. v. Jenkins CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LATOYA JENKINS et al., Defendant and Appellant.	E052342 (Super.Ct.No. INF064867) OPINION

APPEAL from the Superior Court of Riverside County. Richard A. Erwood, Judge. Affirmed with directions.

Patricia Ihara, under appointment by the Court of Appeal, for Defendant and Appellant Latoya Jenkins.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant Lavinski Harrell.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, William M. Wood, and Bradley A. Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendants and appellants, Lavinski Harrell, and his sister, Latoya Jenkins (hereafter referred to collectively as defendants or individually by their last names), guilty of first degree murder in violation of Penal Code section 187 (count 1), first degree burglary in violation of Penal Code section 459 (count 2), and attempted first degree robbery in violation of Penal Code section 211 (count 3). The jury also returned true findings on the special circumstance allegations under Penal Code sections 190.2, subdivisions (a)(17)(A) and (a)(17)(G), that defendants committed the murder charged in count 1 while engaged in the commission or attempted commission of a robbery and while engaged in the commission or attempted commission of a burglary, respectively. The jury also found Harrell guilty of assault with a firearm in violation of Penal Code section 245 (count 4) and returned a true finding on the special allegation in connection with that count that Harrell personally used a firearm in the commission of that offense, within the meaning of Penal Code sections 12022.5, subdivision (a) and 1192.7, subdivision (c)(8).

The trial court sentenced both defendants on the first degree murder conviction with the special circumstance findings to serve the mandatory term of life in state prison without the possibility of parole.

Defendants individually raise various claims of error and also join in the issues raised by each other. We conclude for reasons we explain below that if any error occurred it was harmless. Therefore, we will affirm the judgments of conviction, but will direct the trial court to amend the abstract of judgment in several respects specified in the opinion as to defendant Jenkins.

SUMMARY OF FACTS

The pertinent facts are not disputed. In the afternoon on February 23, 2009, defendant Harrell shot Samuel Cotton in the back while he and his two younger siblings, defendant Jenkins, and brother Drake,[1] were at Cotton's home in Desert Hot Springs. Cotton died as a result of the gunshot wound. Defendant Jenkins had taken her brothers to Cotton's home for the purported purpose of buying marijuana from him. Cotton's sister-in-law, Salassie Monique Winfrey, answered when Jenkins knocked on the door of Cotton's house. Jenkins told Winfrey she wanted to buy $10 of weed from Cotton. Because she knew Jenkins, Winfrey opened the door so that Jenkins could come inside. According to Winfrey, Jenkins did not enter and hesitated at the door, so Winfrey closed the door, but did not lock it. Winfrey went back to the kitchen where she had been washing dishes before Jenkins knocked.

A short time later, Winfrey heard Jenkins ask Cotton for the marijuana, followed by Cotton saying, "Wait a minute . . . Who's with you?" Winfrey heard Jenkins say she

[1] Drake was also charged, but he was tried separately and is not a party to this appeal.

was with her "folks." Jenkins then came into the kitchen and chatted with Winfrey, who continued to wash dishes. Winfrey stopped washing dishes when she heard a man's voice say, "Don't move." Winfrey looked over to where Cotton was sitting at the dining table and saw a man—later identified as defendant Harrell—holding Cotton in a choke hold and pointing a gun at Cotton's head. Defendant Harrell was wearing a black hooded sweater and had a sheer stocking over his head to disguise his face.

Defendant Harrell directed Winfrey to lie down on the floor by waving the gun toward the living room. Winfrey complied. In the living room, Winfrey saw a second man, whom she later identified as Drake, standing in the hallway. Like defendant Harrell, Drake also had a gun, was wearing a black hooded sweater, and had a sheer stocking pulled over his head to disguise his face. Drake repeated defendant Harrell's direction that Winfrey lie down on the floor.

Winfrey, who was pregnant, closed her eyes while lying on the living room floor. She heard defendant Harrell tell Cotton to get down on the ground. Within seconds she heard a gunshot followed by the sound of footsteps moving quickly in the direction of defendant Harrell and then she heard Jenkins say, "Why did you shoot him? You didn't have to shoot him." Jenkins came over to where Winfrey was lying on the floor and said, "Mo, this wasn't supposed to happen. I was supposed to get some weed." Winfrey heard Drake say, "Blood, calm down, Blood, calm down. You all right. You all right." She also heard Harrell say, "Baby girl, you're going to be all right. You're going to be all right." Then Winfrey heard the front door close.

Winfrey identified Jenkins and Drake to the police. Within two months after the shooting, the police had arrested all three suspects. Harrell admitted to the police that he had intended to rob Cotton but claimed the shooting was an accident and occurred when he tried to get Cotton (who outweighed Harrell by 250 pounds) to lie down on the floor. Harrell stated that he was trying to push Cotton onto the floor from the chair on which he was seated when the gun accidently fired into Cotton's back. Harrell admitted he took a half pound of marijuana from the dining room table after the shooting,
and he also admitted that the gun the police recovered when he was arrested was the weapon that killed Cotton. Harrell insisted that Jenkins and Drake had not been involved in the shooting.

The forensic pathologist who conducted the autopsy on Cotton's body testified in pertinent part that the bullet that killed Cotton entered his left back, travelled down through his left lung, then through his heart and lodged in the lower left chest. The trajectory was consistent with the shooter standing and Cotton sitting in a chair. From the absence of stipling and gun powder on Cotton's skin near the entry wound, the pathologist estimated the shot was fired one and one-half feet to two feet from Cotton's back.

Additional facts will be recounted below as pertinent to the issues defendants raise on appeal.

DISCUSSION

We first address the issues defendant Harrell raises and begin with his claim that the trial court incorrectly instructed the jury on the crime of felony murder.

1.

FELONY-MURDER JURY INSTRUCTIONS

The only theory of first degree murder presented at trial was that of felony murder, as set out in Penal Code section 189. With regard to that crime the trial court instructed the jury they could find defendants guilty of first degree murder under the felony-murder theory if they found defendants killed Cotton in the course of committing or attempting to commit robbery or first degree burglary.[2] The trial court instructed the jury on three first degree burglary scenarios: entry into Cotton's home with the intent to commit (1) murder, (2) robbery, and (3) assault with a firearm. Defendant Harrell contends that burglary based on assault with a firearm is a legally invalid theory. We agree. We disagree, however, with defendant Harrell's contention that the error requires reversal of the murder conviction.

Under Penal Code section 189, murder committed during the perpetration or attempt to perpetrate various felonies, including robbery and burglary, is murder in the first degree. However, a burglary in which the underlying felony is assault with a firearm will not support a felony-murder conviction. That is because the Supreme Court in

[2] The trial court also instructed the jury on second degree murder with malice aforethought.

People v. Ireland (1969) 70 Cal.2d 522 (*Ireland*), held that second degree felony murder cannot be based on a death that occurs during a burglary in which the unlawful entry is the defendant's intent to commit assault. In that situation, the purpose of the felony-murder rule, which is to deter people from killing negligently or accidently by holding them strictly liable for deaths that occur during the commission of a felony, is not served because the assault is an integral part of the underlying crime. (*People v. Wilson* (1969) 1 Cal.3d 431, 440.) In *People v. Wilson*, the Supreme Court extended *Ireland* to first degree felony murder. (*People v. Wilson, supra*, 1 Cal.3d at pp. 440-442.) Therefore, it is improper to instruct a jury on first degree felony murder during the course of a burglary in which the underlying felony is an assault with a deadly weapon on the murder victim. (*Id*. at p. 442.)[3]

The trial court's erroneous instruction requires reversal of defendants' first degree murder convictions if the instruction was prejudicial. "The nature of this harmless error analysis depends on whether a jury has been presented with a legally invalid or a factually invalid theory. When one of the theories presented to a jury is legally inadequate, such as a theory which '"fails to come within the statutory definition of the crime"' [citations], the jury cannot reasonably be expected to divine its legal inadequacy. The jury may render a verdict on the basis of the legally invalid theory without realizing

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[3] The Supreme Court overruled *People v. Wilson* in *People v. Farley* (2009) 46 Cal.4th 1053, but held that the overruling does not apply retroactively. (*Id*. at p. 1121.) Defendants committed their crimes in February 2009; the Supreme Court decided *People v. Farley* in July, 2009. Therefore, the overruling does not apply to this case.

that, as a matter of law, its factual findings are insufficient to constitute the charged crime. In such circumstances, reversal generally is required unless 'it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory.' [Citation.]" (*People v. Perez* (2005) 35 Cal.4th 1219, 1233, citing *People v. Guiton* (1993) 4 Cal. 4th 1116, 1128, 1130.)

In this case, the jury found defendants guilty not only of burglary but also of attempted robbery. They also found the robbery-murder special-circumstance allegation true. From those verdicts and true findings, we must conclude that the jury necessarily found defendants guilty of first degree felony murder based on defendant Harrell's killing of Cotton in the course of the attempted robbery. That the jury also might have found defendants guilty of first degree felony murder based on the erroneous burglary theory is harmless in this case, because we know they also correctly relied on a valid theory of first degree felony murder.

2.

CRUEL AND UNUSUAL PUNISHMENT

Defendant Harrell contends that his sentence of life in prison without the possibility of parole based on his felony-murder conviction and the related special circumstance true finding violates the Eighth Amendment to the United States Constitution, because he did not intend to kill and, therefore, did not harbor a culpable mental state with respect to the killing. He concedes in his reply brief that our state Supreme Court addressed and rejected this precise claim in *People v. Taylor* (2010) 48

Cal.4th 574, 661. Defendant Harrell further concedes under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, we are required to follow Supreme Court decisions. Therefore, we reject defendant Harrell's claim in this appeal, and assume he raises it in order to protect his federal appeal rights.

3.

JURY NULLIFICATION

Defendant Harrell contends, by instructing the jurors they could not discuss or consider punishment in their deliberations, the trial court violated Harrell's purported right to jury nullification. We disagree.

We will not discuss defendant Harrell's specific contentions because they all stem from the faulty premise that his Sixth Amendment right to trial by a jury includes the right to have the jury ignore the law as given to them by the trial court. California courts do not recognize such a right. (See *People v. Williams* (2001) 25 Cal.4th 441, 456, and cases cited therein.) "Jury nullification is contrary to our ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law. As one commentator has noted: 'When jurors enter a verdict in contravention of what the law authorizes and requires, they subvert the rule of law and subject citizens – defendants, witnesses, victims, and everyone affected by criminal justice administration – to power based on the subjective predilections of twelve individuals. They affect the rule of men, not law.' [Citation.]" (*Id*. at p. 463.) The court therefore affirmed "the basic rule that

jurors are required to determine the facts and render a verdict in accordance with the court's instructions on the law." (*Ibid*.)

Because jurors do not have the right to ignore the law, we must reject defendant Harrell's claim of instructional error.

4.

INSUFFICIENT EVIDENCE

Defendant Jenkins contends the evidence is insufficient to support the jury's true finding on the felony-murder special-circumstance allegations. We disagree.

A. Standard of Review

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – evidence that is reasonable, credible and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

B. Analysis

Defendant Jenkins correctly states, because she was not the actual shooter, that in order for the jury to find the felony-murder special-circumstance allegations true as to

her, the evidence had to show that either she acted with intent to kill or she was a major participant in the underlying felonies, and as such, aided and abetted the actual killer with reckless indifference to human life. (Pen. Code, § 190.2, subds. (c) & (d).) Jenkins does not dispute that the evidence is sufficient to show she acted as a major participant in the underlying crimes of attempted robbery and burglary. She contends, however, that the evidence was insufficient to show she acted with reckless indifference to human life because the prosecution did not present any evidence to show she subjectively appreciated that her participation in the crimes posed a grave risk to human life. We disagree.

The trial court instructed the jury in this case according to CALCRIM No. 703 that, "A person acts with reckless indifference to human life when he or she knowingly engages in criminal activity that he or she knows involves a grave risk of death." Participation in an armed robbery under conditions in which it is reasonable to expect violence to erupt is sufficient to show awareness of a grave risk of death, and thus to establish reckless indifference to human life. (*People v. Hodgson* (2003) 111 Cal.App.4th 566, 579-580 ["Appellant had to be aware use of a gun to effect the robbery presented a grave risk of death. However, instead of coming to the victim's aid after the first shot, he instead chose to assist [his coparticipant] in accomplishing the robbery . . . ."].)

In this case, the evidence showed that defendant Jenkins knocked on the door of the victim's house in order to obtain entry for her brothers, both of whom were armed

with loaded firearms. The jury could reasonably infer from the evidence presented at trial that defendant Jenkins knew each of her brothers carried a loaded firearm. From the evidence that defendant Jenkins willingly participated in the underlying attempted robbery knowing that her brothers were armed with loaded weapons, the jury could further infer that defendant Jenkins subjectively appreciated the possibility that one of her brothers might fire his weapon and that someone might get shot and killed. One of the primary reasons for carrying a loaded firearm while participating in a crime is to convey the threat that the weapon will be used if necessary. The evidence that defendant Jenkins subjectively appreciated the grave risk of death created by her knowing participation in an attempted robbery in which loaded firearms were used is further supported by her reaction when defendant Harrell shot the victim. Defendant Jenkins asked why her brother shot the victim and also told Ms. Winfrey that the shooting was not supposed to happen. Both statements reflect subjective awareness that what occurred might actually happen. If she had not appreciated that risk, defendant Jenkins would have expressed shock or said something to the effect that she had no idea that someone could get shot and killed. Moreover, like the defendant in *People v. Hodgson*, defendant Jenkins did nothing to help the victim after he was shot, and instead left the house with her brothers, without determining whether the victim was dead or alive.

The cited circumstantial evidence is sufficient to support the jury's implied finding that defendant Jenkins subjectively appreciated that her participation in the underlying

robbery created a grave risk to human life. Therefore, we reject her challenge to the sufficiency of the evidence.

5.

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant Jenkins contends, citing various purported errors, that she was denied her right under the Sixth Amendment to the United States Constitution to the effective assistance of counsel.

A. Standard of Review

To establish a claim of ineffective assistance of counsel, defendant must "demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541, citing, among other cases, *Strickland v. Washington* (1984) 466 U.S. 668.) In evaluating counsel's actions at trial, "A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. [Citation.] Thus, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy under the circumstances. [Citation.]" (*People v. Dennis*, *supra,* at p. 541.)

B. Analysis

(1.) ***Aranda-Bruton* Error**

We first address defendant Jenkins contention that her trial attorney was ineffective because he failed to object to purported *Aranda-Bruton*[4] error during the trial testimony of one of the investigating police officers. Under *Aranda* and *Bruton*, a criminal defendant's constitutional right to confront and cross-examine witnesses requires the exclusion of a nontestifying codefendant's extra-judicial statement that incriminates the defendant. (*Bruton, supra,* 391 U.S. at pp. 126, 132, 135; *Aranda, supra,* 63 Cal.2d at pp. 528, 530, 531.)

Defendant Jenkins claims her constitutional right to confront and cross-examine codefendant Harrell was violated first when Sergeant Gil testified that he interviewed Harrell who told him, among other things, that his intent in going to the victim's home on February 23 was to get marijuana, cash, "or anything that they could get or he could get his hands on . . . ." Defendant Jenkins contends the officer's use of the pronoun "they" could only have referred to her and her brother Drake. Therefore, her attorney should have objected to the testimony, not only under *Aranda-Bruton* but also as testimonial hearsay that violates *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

Defendant Jenkins also contends that her attorney was ineffective during cross-examination of Sergeant Gil because he asked the officer a question that required

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[4] *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*); *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).

clarification, and the clarification implicated defendant Jenkins. Defendant Jenkins is wrong about which attorney asked the offending questions. Defendant Harrell's attorney, Mr. Silva, asked the questions about which defendant Jenkins complains. Specifically, defendant Harrell's attorney asked Sergeant Gil to confirm that defendant Harrell had "indicated to you that the other two individuals were not involved; is that correct?" Sergeant Gil answered, "Which part?" Defendant Harrell's attorney clarified, "With the shooting of Mr. Cotton." Sergeant Gil said, "Correct." On redirect, the prosecutor asked for additional clarification: "I just want to make sure we clarify. Again, I just want to focus on Mr. Harrell's statement about himself. You indicated that on cross-examination that he stated that he was the only one involved. Do you mean by that the only one involved in shooting Mr. Cotton?" Sergeant Gil responded, "That's why I asked for clarification, yes. It was just regarding the shooting." Defendant Jenkins contends the obvious inference from Sergeant Gil's responses is that defendant Harrell had admitted Jenkins and Drake were both involved in the other part, namely the attempted robbery and burglary.

We need not, and therefore will not, actually resolve the question of whether the cited testimony violated *Aranda-Bruton* or *Crawford*. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components: deficient performance and prejudice. (*People v. Dennis, supra*, 17 Cal.4th at pp. 540-541.) We need not determine the performance component—although "a mere failure to object to evidence or argument seldom establishes counsel's incompetence"

(*People v. Ghent* (1987) 43 Cal.3d 739, 772)—because it is easier to dispose of defendant's claim on the ground of lack of sufficient prejudice. (See *Strickland v. Washington, supra*, 466 U.S. at p. 697 ["If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."].) In other words, we may assume without actually deciding, that the testimony in question violated defendant Jenkins's rights under *Aranda-Bruton* and *Crawford*, such that we may further assume that her attorney should have objected. The dispositive issue is whether that presumed oversight was prejudicial.

In addressing prejudice, defendant Jenkins contends we must apply the *Chapman*[5] standard of harmless beyond a reasonable doubt because the evidence in question violates her right under the Sixth Amendment to the United States Constitution to confront and cross-examine witnesses. Defendant Jenkins's assertion ignores the fact, which she concedes, that her attorney did not object in the trial court to the admissibility of the evidence she now challenges on appeal. Because there was no objection in the trial court, she has forfeited the claims for review on appeal. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1185). We are limited to addressing her claims in the context of ineffective assistance of counsel, and therefore we apply the prejudice standard pertinent to such a claim.

[5] *Chapman v. California* (1967) 386 U.S. 18

Defendant Jenkins's defense at trial was that she was not involved in any of the crimes.[6] Accordingly, the question we must resolve is whether it is reasonably probable the jury would have believed her defense or at the very least would have had a reasonable doubt about her guilt, if the jury had not heard the noted testimony of Sergeant Gil.

In order for the jury to have a reasonable doubt about whether defendant Jenkins was involved in the robbery, the jurors would have had to believe, as her attorney argued, that she took her brothers to buy marijuana from Samuel Cotton and had no idea they intended to rob him. Apart from the total absence of evidence to indicate defendant Jenkins was surprised when defendant Harrell held Cotton in a choke hold and told him not to move, in order to believe her defense, the jury would have to find that Ms. Winfrey was mistaken about several facts. In particular, defendant Jenkins's attorney argued that Ms. Winfrey must have been mistaken when she testified that only defendant Jenkins was at the door when Ms. Winfrey opened it because a neighbor had testified that she had seen three people walk up to Cotton's front door shortly before the shooting. Jenkins's attorney argued that in order for Jenkins to be alone, Harrell and Drake would have had to run behind the building to hide, but the neighbor did not say she saw anything like that. Relying on the argument that Ms. Winfrey was wrong, and all three people were at the

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[6] The Attorney General incorrectly asserts that "[t]he entire defense case focused on the fact that Jenkins brought her brothers to the house to commit the planned robbery but she had no idea a shooting would occur." Such a defense would result in defendant Jenkins's liability for the first degree murder of Samuel Cotton under the felony-murder theory. Consequently, defendant Jenkins's only defense in this case was to assert that she was not involved in any of the crimes and had no idea they would occur, which is precisely what her attorney argued in closing.

door, Jenkins's attorney also argued that the men could not have been wearing stocking masks, as Ms. Winfrey claimed, because she certainly would not have let them in the house if they had their faces concealed.

The neighbor, Ms. Holland, testified in pertinent part that she looked away after she saw the three people walk up to Cotton's front door and that she did not see them go in the house.[7] In other words, she did not see everything that happened at the front door to the house; Harrell and Drake might well have moved away from the front door in order to conceal themselves. Although it was circumstantial, there was significant evidence that defendant Jenkins participated in the plan to rob Cotton.

In our view it is not reasonably probable the jury would have rejected Ms. Winfrey's testimony, and thereby reached results more favorable to defendant Jenkins on any of the charges, if the jurors had not heard Sergeant Gil's testimony. Sergeant Gil used the offending pronoun only once, as defendant Jenkins acknowledges. Defendant Jenkins notes, however, that during closing argument the prosecutor repeated the sergeant's testimony, and argues that in doing so the prosecutor "supplied the missing 'intent' element for Jenkins's involvement in the crimes and directly implicated Jenkins as an accomplice in the attempted robbery." The prosecutor did refer to Sergeant Gil's testimony in arguing the intent element of the robbery charge. He pointed out that the jurors had "heard from Sergeant Gil that defendant Harrell confessed to wanting what the

[7] Ms. Holland could not identify any of the people because they all had their heads covered by the hoods on their sweatshirts.

victim had. And he took a small bag of marijuana, took about half a pound of marijuana that was lying on the table. [¶] You also heard from Sergeant Gil that that was the intent to go in and take from the victim, money, drugs, whatever it was. Whatever they intended to take, it wasn't theirs to take. And that was the intent going in." Although artfully phrased, the prosecutor's argument is close enough to defendant Harrell's testimony to be problematic. However, the prosecutor also emphasized in his closing argument that defendant Harrell's statements "can only be used against him. That's why the questions were very direct and in point. [¶] We were asking [Sergeant Gil] only what did defendant Harrell tell you about his intent and his involvement. And those statements can only be used against him and that's why the questioning proceeded in that format."[8]

(2.) Severance Motion

Defendant Jenkins next contends her attorney should have moved to sever her trial from that of defendant Harrell and his failure to do so constitutes ineffective assistance of counsel. We disagree.

To prevail on her claim that trial counsel was ineffective because he did not move to sever her trial from that of defendant Harrell, defendant Jenkins "must show that

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[8] Before trial, the attorneys had agreed, in order to avoid *Aranda-Bruton* problems, that the defendants' statements would be presented to the jury through the testimony of the police officers who had interviewed them, and the officers would be admonished not to recount any statements one defendant made about the other. Later, defendant Jenkins's attorney successfully moved to suppress her statement to the police, so the jury only heard defendant Harrell's statement. As a result of the agreed-upon approach, the trial court did not instruct the jury on how to consider evidence that was admitted at trial for a limited purpose because in theory no such evidence had been presented.

reasonably competent counsel would have moved for severance, that such motion would have been successful, and that had the [cases] been severed an outcome more favorable to [her] was reasonably probable." (*People v. Grant* (1988) 45 Cal.3d 829, 864-865.)

Defendant Jenkins has not made the necessary showing. Penal Code section 1098 requires a joint trial when defendants are jointly charged with committing a crime, "unless the trial court order[s] separate trials." As defendant Jenkins correctly notes, a trial court should order separate trials of codefendants "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Massie* (1967) 66 Cal.2d 899, 917, fns. omitted.)

Defendant Jenkins contends severance was warranted in this case because in a separate trial her exculpatory statements to the police that she did not know or realize defendant Harrell would shoot Cotton would have been admissible at trial. Defendant Jenkins further contends that the statements "were exculpatory as to the special circumstance." Defendant Jenkins's statements are not exculpatory. Her lack of actual knowledge that defendant Harrell intended to shoot Cotton would not exonerate her for first degree murder based on felony murder or from a true finding on the robbery-murder special circumstance. As discussed above in addressing her challenge to the sufficiency of the evidence, in order to establish the felony-murder special circumstance, the evidence must show that defendant Jenkins was a major participant in the underlying

crime and acted with the mental state either of intent to kill or reckless indifference to human life, which means that she knowingly participated in criminal activity she knew poses a grave risk to of death. (Pen. Code, § 190.2, subd. (d); *People v. Estrada* (1995) 11 Cal.4th 568, 577-578.)

Because her actual knowledge about her brothers' intent to kill is irrelevant, defendant Jenkins has not demonstrated that her statements to the police had any exculpatory value such that a separate trial was warranted. Similarly, we must reject her speculation, raised for the first time in her reply brief, that defendant Harrell might have testified on her behalf if she had been tried separately. Even if he were to testify, he would only have confirmed her statement that she did not intend to kill Cotton and that she did not know her brother would or might do so. That testimony is irrelevant for the reasons just discussed—defendant Jenkins's actual knowledge in that regard is irrelevant. What she must know, or subjectively appreciate, is that her conduct poses a grave risk of death and that showing is made with the evidence that she knowingly participated in a robbery in which each of her brothers was armed with a loaded gun. Accordingly, defendant Jenkins has not demonstrated any legitimate basis upon which her attorney could have moved to sever her trial from defendant Harrell's. As a result, she has failed to establish the first prong of her ineffective assistance of counsel claim with respect to the severance issue.

(3.) Amplification of Jury Instruction

Defendant Jenkins contends her trial attorney was ineffective because he did not request a jury instruction that explained to the jury that reckless indifference to human life requires a subjective awareness that someone could die. The trial court instructed the jury in precisely those terms, defendant Jenkins's contrary view notwithstanding.

As set out above in our discussion of defendant Jenkins's sufficiency of the evidence claim, the trial court instructed the jury in this case that, "A person acts with reckless indifference to human life when he or she *knowingly* engages in criminal activity that he or she *knows* involves a grave risk of death. [Emphasis added.]" The trial court's instruction clearly conveys the requirement of subjective awareness, i.e., that the defendant know what he or she is doing and know the risk involved. Because the trial court instructed the jury on the subjective awareness necessary to find the special circumstance allegations true, we must reject defendant Jenkins's ineffective assistance of counsel claim.

We, likewise, must reject her suggestion that the prosecutor improperly defined reckless indifference during closing argument. The prosecutor quoted the pertinent jury instruction in his closing argument: "Reckless indifference to human life is defined as engaging in criminal activity that you know involves a grave risk of death." Defendant Jenkins's real complaint is with the evidence the prosecutor cited as proof she acted with reckless indifference—her participation in a crime where loaded firearms are being used. Arguably, the prosecutor should have added the word "knowing" to the phrase, i.e., her

knowing participation in an armed robbery. However, because the trial court clearly instructed the jury that the attorney's arguments are not evidence, we must conclude the prosecutor's oversight was harmless.

To the extent defendant Jenkins faults her trial counsel for not defending against the special circumstance allegations in his closing argument, we must likewise reject that claim. A previously noted, trial counsel made the tactical decision to argue that defendant Jenkins did not participate in the crimes at all. After asserting that argument, he could not also argue that, even if she were a participant in the underlying crimes, the evidence does not support the special circumstance allegations. Moreover, defendant Jenkins does not suggest the form such an argument would have taken in this case. Instead, she argues there was strong evidence that she did not act with reckless disregard for human life. We construe that argument as an implied challenge to trial counsel's tactical decision to argue that defendant Jenkins was not a participant in any of the crimes. Because she does not address the issue directly, defendant Jenkins has not overcome the presumption that trial counsel's decision was a sound trial strategy. (*People v. Dennis, supra,* 17 Cal.4th at p. 541.) For these reasons, we must conclude defendant Jenkins has not demonstrated that trial counsel was ineffective.

(4.) <u>Aider and Abettor Instruction</u>

Defendant Jenkins contends her attorney was ineffective because he did not object to the trial court instructing the jury according to CALCRIM No. 400, that an aider and abettor is "equally guilty of the crime whether he or she committed it personally or aided

and abetted the perpetrator who committed it." Defendant Jenkins contends the instruction is incorrect and her attorney should have asked the trial court to modify the instruction by deleting the "equally guilty" language. We conclude that any error was harmless in this case.

Defendant Jenkins is correct that three cases addressing the issue of whether an aider and abetter is "equally guilty" of the crime committed by the actual perpetrator were decided before her trial in this case.[9] In *People v. McCoy* (2001) 25 Cal.4th 1111, the first of the three, our state Supreme Court held that an aider and abettor may be guilty of a crime greater than that committed by the actual perpetrator depending on the aider and abettor's intent at the time of the crime. (*Id*. at p. 1120.) Therefore, reversal of the actual perpetrator's conviction does not necessarily compel reversal of the aider and abettor's conviction. (*Id*. at p. 1122.)

In *People v. Samaniego* (2009) 172 Cal.App.4th 1148, Division Two of the Second District relied on *People v. McCoy* to conclude that an aider and abettor's guilt may be less than that of the actual perpetrator "if the aider and abettor has a less culpable mental state. [Citation.] Consequently, CALCRIM No. 400's direction that '[a] person is *equally guilty* of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it' [citation],

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[9] Defendant Jenkins cites a fourth case, *People v. Concha* (2009) 47 Cal.4th 653. That case, however, involves provocative act murder, a particular species of crime that does not depend on aiding and abetting, and as such adds little to her argument.

while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified." (*Samaniego*, at pp. 1164-1165.)

In *People v. Nero* (2010) 181 Cal.App.4th 504, the most recent of the cases in question, Division Three of the Second District held that the "equally guilty" language in then CALJIC No. 3.00, now CALCRIM No. 400, can be misleading in "even unexceptional circumstances." (*Nero*, at p. 518.) As a result the language has been omitted from CALCRIM 400. (See CALCRIM No. 400 (2010).)

Assuming without actually deciding that defendant Jenkins's attorney should have asked the trial court to modify CALCRIM No. 400 by removing the "equally guilty" language, the presumed error was not prejudicial. Here again, we assess prejudice under the standard pertinent to ineffective assistance of counsel claims, i.e., whether it is reasonably probable the jury would have reached results more favorable to defendant Jenkins on any of the charges or special circumstance allegations if the "equally guilty" language had been omitted from the aiding and abetting instruction.

Defendant Jenkins argues the instructional error was prejudicial but she only discusses its purported effect on the felony-murder special-circumstance allegation. In particular, she argues that her "reaction of surprise and upset to the shooting should have undermined any notion that she actually appreciated the risk of danger to human life posed by her conduct." The aiding and abetting instruction does not apply to the felony-murder special-circumstance allegation, as defendant Jenkins implicitly acknowledges in her argument. As previously discussed in her challenge to the sufficiency of the

evidence, the trial court instructed the jury, in order to find the felony-murder special-circumstance allegation true as to defendant Jenkins, the jury had to find either she acted with intent to kill or she was a major participant in the underlying crimes, and as such, aided and abetted the actual killer with reckless indifference to human life. (Pen. Code, § 190.2, subds. (c) & (d).) The trial court instructed the jury, "A person acts with reckless indifference to human life when he or she knowingly engages in criminal activity that he or she knows involves a grave risk of death." (See CALCRIM No. 703.) In other words, the trial court instructed the jury that defendant Jenkins had to harbor a specific intent, or mental state in order for the jury to find the special circumstance allegations true.

Because the trial court separately instructed the jury on the mental state required for them to find the special circumstance allegations true as to defendant Jenkins, we must conclude it is not reasonably probable the jury would have reached results more favorable to her on those allegations if the trial court had deleted the phrase "equally guilty" from CALCRIM No. 400. In short, that instruction was irrelevant to the jury's findings on the special circumstance allegations.

(5.) <u>Sentence Reduction</u>

Defendant Jenkins contends her trial attorney should have objected to her mandatory sentence of life in prison without the possibility of parole because under the circumstances of this case that sentence violates the state and federal constitutional prohibitions against cruel and/or unusual punishment. Again, we must disagree.

"'"The cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution prohibits the imposition of a penalty that is disproportionate to the defendant's 'personal responsibility and moral guilt.' [Citations.] Article I, section 17 of the California Constitution separately and independently lays down the same prohibition."' [Citations.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 739.) "[A] punishment may violate the California constitutional prohibition [against cruel or unusual punishment (Cal. Const., art. I, § 17)] 'if . . . it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*), quoting *In re Lynch* (1972) 8 Cal.3d 410, 424.) In determining whether a sentence is cruel or unusual under California law,[10] this court considers three factors. First, we look at "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*In re Lynch, supra*, at p. 425.) Next, we "compare the challenged penalty with the punishments prescribed" in the same jurisdiction for more serious crimes (*id*. at p. 426); and third, we compare the challenged punishment with punishments prescribed for the same offense in other jurisdictions (*id*. at p. 427).

The California Supreme Court has also held, provided a punishment is proportionate to the defendant's individual culpability, what the court referred to as "intracase proportionality," that there is no requirement it be proportionate to the

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10 "Whereas the federal Constitution prohibits cruel 'and' unusual punishment, California affords greater protection to criminal defendants by prohibiting cruel 'or' unusual punishment." (*People v. Haller* (2009) 174 Cal.App.4th 1080, 1092.)

punishments imposed in other similar cases, what the court dubbed "intercase proportionality." (*People v. Webb* (1993) 6 Cal.4th 494, 536; *People v. Mincey* (1992) 2 Cal.4th 408, 476; *People v. Miller* (1990) 50 Cal.3d 954, 1010.) In other words, a determination of whether a punishment violates the state constitutional prohibition against cruel or unusual punishment may be based solely on the offense and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10; see, e.g., *Dillon*, *supra*, 34 Cal.3d at pp. 479, 482-488; *People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200.)

Although defendant Jenkins contends that her sentence also violates the federal constitutional prohibition against cruel and unusual punishment, she does not separately address the federal constitutional issue. Instead, she asserts that the federal and state analyses are similar, and then she undertakes only the state analysis. Because the state Constitution prohibits cruel or unusual punishment, it affords the greater protection with the result that if a sentence does not violate the state Constitution it necessarily will not violate the federal Constitution. For each of these reasons we will only address the state constitutional issue.

"The Constitution does not forbid even the death penalty (and here defendant received the lesser penalty of life imprisonment without parole [citation]) for a person who was not the actual killer and did not actually intend to kill, but who was a major participant in the underlying felony, acting with reckless indifference to human life.

[Citations.] Penal Code section 190.2, subdivision (d) . . . contains that requirement." (*People v. Mora* (1995) 39 Cal.App.4th 607, 616 (*Mora*), fns. omitted, citing *Tison v. Arizona* (1987) 481 U.S. 137, 152, 158.)

In *Mora*, as in this case, Mora and Arredondo went to a drug dealer's home at night to rob him. Mora knew the drug dealer, so he knocked on the door and was let inside. While Mora smoked marijuana with the drug dealer and another person in the house, Arredondo knocked at the door. At Mora's request, the others agreed that his "friend," Arredondo, could come in to use the bathroom. When the door was opened, Arredondo entered the house with a high powered rifle. The drug dealer resisted, and Arredondo shot him in the chest. After stepping over the drug dealer's body, Arredondo shot him again in the back. (*Mora*, *supra*, 39 Cal.App.4th at p. 611.)

At sentencing, the trial court distinguished Mora's conduct from that of Arredondo, whom the court viewed as "a cold-blooded killer," and therefore reduced Mora's sentence on the felony-murder special circumstance from life in prison to 25 years to life. (*Mora*, *supra*, 39 Cal.App.4th at p. 613.)

The *Mora* court concluded that the mandatory sentence of life in prison without the possibility of parole did not constitute cruel or unusual punishment in violation of the state Constitution, and therefore the trial court erred in reducing Mora's sentence. In reaching that conclusion, the *Mora* court focused on the nature of the offense and/or the nature of the offender in accordance with the dictates of *People v. Dillon*. With respect to the latter, the *Mora* court noted that unlike the defendant in *Dillon*, who was 17 years old

and had no criminal record, Mora was 23 years old and had three prior convictions. (*Mora*, *supra*, 39 Cal.App.4th at p. 618.)

We are unable to distinguish the circumstances in this case from those in *Mora*, and therefore we will follow its lead. With respect to the nature of the offense, defendant Jenkins concedes as she must that an armed robbery resulting in death of the robbery victim is a serious crime. Nevertheless, she minimizes her participation in the criminal activity by claiming she was pressured by her brothers "because she is a girl" to assist them in gaining entry into Cotton's residence so they could rob him. That, according to defendant Jenkins, was the extent of her involvement in the criminal venture. Defendant Jenkins also claims, that although she knew her brothers both were armed with loaded handguns, she "did not think anything would go wrong."

The felony-murder special-circumstance finding pursuant to which the trial court sentenced defendant Jenkins to the mandatory term of life in prison without the possibility of parole is directed at precisely the unintended circumstance that occurred in this case—that an armed participant in the robbery would either intentionally or inadvertently shoot and kill someone. The statute is directed at discouraging criminals from using loaded firearms when committing crimes. Moreover, defendant Jenkins's participation in the robbery was critical; without her involvement, her brothers would not have gained entry, and could not have accomplished the robbery. Contrary to defendant Jenkins, her participation in the crime was pivotal to its success. Under these

circumstances we simply cannot say the offense does not warrant the punishment imposed.

Like the defendant in *Mora*, and unlike the defendant in *People v. Dillon*, defendant Jenkins was 23 years old at the time of the crime, and was on summary probation for a petty theft conviction. Here, as in *Mora*, "[n]either the nature of the offense nor the nature of the offender compels a conclusion that in the circumstances of this case a sentence of life imprisonment without parole would be so grossly disproportionate as to violate the constitutional prohibition against cruel or unusual punishment." (*Mora, supra,* 39 Cal.App.4th at p. 618.)

Defendant Jenkins also contends the penalty of life in prison without the possibility of parole is harsh when compared with the sentence imposed years earlier on Leslie Van Houten, who was convicted of several first degree murders and is serving two consecutive terms of life in prison with the possibility of parole. (See *In re Van Houten* (2004) 116 Cal.App.4th 339, 347 [Fourth Dist., Div. Two].) There is no question the penalty in this case is harsh, but it is not disproportionate to defendant Jenkins's criminal culpability. Therefore, we must reject her claim that she was denied the effective assistance of counsel because her attorney did not object to the mandatory sentence imposed in this case.

6.

SENTENCING ISSUES

Defendant Jenkins asserts two issues with regard to sentencing, both of which the Attorney General concedes. First, she contends the trial court's order directing her to pay $7,500 to the victim compensation fund should have specified that liability for the payment is joint and several, in that she and defendant Harrell are entitled to credit for sums paid by the other. (See *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535 [Fourth Dist., Div. Two].) The Attorney General concedes the error. Therefore, we will order the abstract of judgment be amended to reflect that liability for restitution is joint and several.

Defendant Jenkins also contends the trial court incorrectly calculated her custody credit by awarding her 534 days instead of the 553 days of actual custody credit to which she is entitled. The Attorney General concedes we may correct the error, "assuming" defendant is entitled to additional credit. We construe the Attorney General's statement as a concession of the error.[11] Accordingly, we will order the abstract of judgment amended to reflect custody credit of 553 days.

[11] The statement is either a concession of the error or an admission that the Attorney General did not actually calculate the credit to which defendant Jenkins is entitled.

DISPOSITION

The trial court is directed to modify the judgment to reflect that payment of $7,500 to the victim compensation fund is to be paid jointly and severally with codefendant Harrell, and that defendant Jenkins is entitled to 553 days of actual custody credit. The trial court is further directed to prepare an amended abstract of judgment that reflects the modifications and to forward copies of the amended abstract to the appropriate governmental agencies. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
J.

We concur:

RAMIREZ
P.J.

RICHLI
J.